IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-6474

FRANK SMITH,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

Philip J. Padovano
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

ATTORNEY FOR PETITIONER

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Petitioner, Frank Smith, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Florida entered in these proceedings on October 28, 1982.

OPINIONS BELOW

The opinion of the Florida Supreme Court on the direct appeal of the Petitioner's conviction and sentence of death is reported as Smith v. State, ____So.2d ____ (Fla. 1982) and is attached as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on October 28, 1982. A timely Motion for Rehearing was denied on January 27, 1983. The Order denying rehearing is attached as

Appendix B. Jurisdiction of this Court is invoked under 28 U.S.C. §1247(3) Petitioner having asserted below and asserting here a deprivation of rights guaranteed by the Constitution of the United States.

QUESTION PRESENTED

1. Whether a general verdict of guilt in a capital case based either upon a finding of premeditated murder or the alternative theory that the accused was criminally liable for the acts of an accomplice under the felony murder rule is constitutionally insufficient to support the imposition of the death penalty.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

> Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted...

and the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> [N]or shall any state deprive any person of life, liberty or property without due process of law.

This case also involves the following provisions of the statutes of the State of Florida which are set forth in Appendix C to this brief. Fla. Stat. Ann. §782.04, 921.141.

STATEMENT OF THE CASE

A. Course and Disposition of the Proceedings Below

On January 15, 1979 the Grand Jury for Wakulla County, Florida indicted the Petitioner for first degree murder, armed robbery, kidnapping, and sexual battery in connection with the shooting death of one Sheila Porter on December 12th or 13th, 1978. (TR-27-30)[1] The first degree murder charge was based entirely upon the felony murder rule and contained the allegation that the murder occurred while the Petitioner was engaged in the commission of the robbery and kidnapping of Ms. Porter. (TR-27).

The Petitioner entered a Plea of Not Guilty and filed a written Motion to Dismiss the indictment (TR-43-46) contending, among other things, that the death penalty could not be applied constitutionally to a conviction obtained under the felony murder rule. On February 21, 1979 the motion was argued before the trial court and denied. (TR-148).

Following a change of venue upon the Petitioner's request the trial began in Monticello, Florida on April 16, 1969. On the third day of the proceedings before the jury Victor Hall, an accomplice who had agreed to testify for the State, made an improper reference to the Petitioner's previous conviction for armed robbery and the Court declared a mistrial. (TR-413).

On August 3, 1979 another Grand Jury in Wakulla County, Florida filed an "Amended Indictment" against the Petitioner (TR-418-421). The new indictment was the same in all respects except that the murder charge was changed from felony murder to premeditated murder (TR-418).

A second trial began in Apalachicola, Florida on August 27, 1979 following a second change of venue. During the trial the prosecutor explained to the jury that the Petitioner could be

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[1] Citations to the record on appeal shall be made throughout this petition by the letters "TR" and the appropriate page number.

found guilty under the indictment of either premeditated murder or felony murder. He advocated the felony murder theory a number of times in his closing argument (TR-2629, 2634, 2640, 2646) and the trial judge instructed the jury on the law of felony murder (TR-2676, 2679).

After the jury retired to deliberate, the foreman returned to ask the trial judge if the jury could convict the Petitioner of first degree murder in the absence of any evidence that he was in fact the "trigger man". (TR-2711-2713). The judge declined to answer the question directly and ultimately asked the jurors to re-read the written jury instructions (TR-2713, 2714).

The jury returned a verdict of guilty as charged on each count of the indictment (TR-480-482,484,485) and after consideration of the testimony and evidence presented during the penalty phase the jury rendered an advisory verdict recommending that the Court impose the death penalty (TR-488).

A sentencing hearing was held before the Court on September 10, 1979 and the Petitioner was sentenced to death for the charge of first degree murder, and to a term of life imprisonment for each of the remaining charges (TR-554) with the three life prison terms to run consecutively to the death sentence. The trial judge submitted written findings in support of the death sentence. (TR-549-553).

The Petitioner timely filed an appeal to the Florida Supreme Court on September 17, 1979 to seek review of the judgment and sentence of the trial court. (TR-587). He contended among other things that the death penalty could not be applied constitutionally to a "non-trigger man" found guilty upon the basis of the felony murder rule and that the sentence of death in the instant case should be vacated because it was impossible to determine whether the jury accepted that alternative theory as

opposed to the theory of premeditated murder.[2]

The Florida Supreme Court disagreed with that contention as well as all of the other arguments made on Petitioner's behalf and entered an Order on October 28, 1982 affirming Petitioner's judgment and sentence of death. (Appendix A). The argument relating to the effect of the alternative felony rule theory was again raised in the Petitioner's Motion for Rehearing before the Supreme Court but that motion was denied by the Court on January 27, 1983. (Appendix B).

B. Statement of the Facts

The direct evidence against the Petitioner consisted mainly of the statements he made to the police and the testimony of the alleged accomplice Victor Hall.

The victim, Sheila Porter, was a convenience store clerk who was on duty at the Junior Food Store in Medart, Florida on the evening of December 12, 1978. Kathy Mispell testified that she was in the store talking to Ms. Porter at about 10:20 p.m. when she observed two or three black people pulling up in a white Chrysler with a license tag bearing the word "Chief" on the front. (TR-2185). Kim Newton, who also observed a white car parked in front of the store (TR-2196) testified that about 10:45 she observed a tall, black man with broad shoulders come into the store to ask about some wine (TR-2194). Ms. Porter was apparently in the store when Newton and Mispell left.

Just prior to 11:00 p.m. Ms. Linda Falin came to the store and found it open but unoccupied (TR-2198). It was soon determined that the victim's coat and purse were still in the store (TR-2179) and that $127.50 was missing from the cash register (TR-2201). The next day Elijah Hunter of Tallahassee called the Wakulla County Sheriff's Department to report that he

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[2]This argument was made in Point VII of the Petitioner's Brief in the Florida Supreme Court pp.35-40.

had seen a car similar to the white Chrysler described in a news broadcast concerning the disappearance of Ms. Porter. Hunter testified that he observed the Petitioner Frank Smith and one Johnny Copeland on the morning of December 13, 1983 in a white Chrysler on Texas Street in Tallahassee (TR-2204). He saw Smith and Copeland around noon but at that time, the car was painted black (TR-2205).

Based upon this information, officers of the Wakulla County Sheriff's Department went to Tallahassee in an attempt to locate Smith and Copeland. Both defendants were brought down to the Wakulla County Jail for questioning that evening and each of them denied involvement in the offense.

The Petitioner, Frank Smith, was arrested for robbery and kidnapping on December 14, 1978 the following day. That evening, he made a statement to the police which led to the arrest of Johnny Copeland and ultimately to the discovery of the body of Ms. Porter. On December 18, 1978 he made a more complete statement to Investigator Al Gandy of the State Attorney's Office and Deputy Johnny Miller of the Wakulla County Sheriff's Department (TR-2255). The Petitioner told Gandy that he and Johnny Copeland discussed the possibility of committing a robbery (TR-2258) and that he drove Copeland and Victor Hall to the Junior Food Store in Medart (TR-2261).

Petitioner told the officers that Johnny Copeland got out of the car and went into the store while he began to pump gas. (TR-2261). Copeland then came out of the store with the store clerk and a little over $100 (TR-2261). He put the store clerk into the front seat of the car and the money into the ashtry (TR-2261). They drove to Johnny Copeland's house and got into his yellow Chevrolet Nova, after which they proceeded to the El Camino Motel in Tallahassee (TR-2263).

The Petitioner admitted that he rented room Number 1 of the motel and that he actually went into the room and observed Johnny Copeland and Victor Hall having sexual intercourse with the

victim (TR-2265). While Victor Hall was in the process of having intercourse with Ms. Porter, Johnny Copeland suggested that they were going to kill her (TR-2266). Petitioner then advised that both he and Victor Hall objected to that plan (TR-2266).

The parties got into Johnny Copeland's yellow Nova and drove to a wooded area out off Tram Road in Tallahassee (TR-2267). Hall and Smith were trying to talk Copeland out of killing Ms. Porter (TR-2267, 2268). Copeland got out of the car and began to lead the victim into the woods at gunpoint. Petitioner stated that he walked along side with them arguing with Copeland. He told Copeland to just give the money back and to take the girl back home (TR-2268). Copeland and the girl walked a little further out into the woods and then Petitioner Smith heard two or three shots (TR-2268).

Victor Hall, who testified for the State in Petitioner's trial, related a somewhat different version of the facts than that persented by Petitioner's December 18, 1978 statement to police. Hall said that all three of the parties, including Frank Smith, had intercourse with the victim at the El Camino Motel (TR-2373). He further stated that both Smith and Copeland wanted to kill the girl and that he was the only one who objected to killing her (TR-2363, 2374). According to Hall's version of the facts, Smith and Copeland took the girl into the woods while he stayed in the car (TR-2376). He heard three shots (TR-2377) and when Copeland and Smith returned from the woods without the girl Smith was the one who had the gun (TR-2378).

Daniel King testified that about a week before the murder Johnny Copeland pawned a .25 caliber pistol to him for $20. (TR-2510). He came to repay the loan the Friday before the offense was committed and at that time he test fired the pistol in Daniel King's yard (TR-2511). Police Officers later located a .25 caliber shell casing in Daniel King's yard.

A ballistics expert testified that the shell casings found at the scene of the homicide were produced by the same weapon

which ejected the shell casing in King's yard (TR-2544). Records of the K-Mart Store in Tallahassee establish that .25 caliber ammunition of the same brand as that used in the homicide were purchased shortly before the offense by Johnny Copeland (TR-2326). Copeland's girlfriend, Florence Smith, testified that when the police came to arrest Copeland she concealed a small black pistol under the front seat of his car (TR-2505). Following the arrest she gave the pistol to Johnny Copeland's mother and it was never recovered.

Ms. Porter's body was discovered at about 10:00 a.m. in a wooded area off Tram Road and in the general location described to the officers by Petitioner Smith. The medical examiner testified that Ms. Porter died as a result of gunshot wounds to the head (TR-2171-2173).

The differing versions as to how the homicide actually occurred were presented entirely within the State's case in chief. The State presented the evidence of the first version by relating the Petitioner's pretrial statements to the police officer and the second version through the testimony of Victor Hall. The defendant did not testify or call any witnesses on his behalf.

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The issue presented in this Petition for Writ of Certiorari was first raised in the trial court in a written Motion to Dismiss the indictment (TR-43-46). The motion was denied (TR-148) and the issue was raised again on direct appeal to the Florida Supreme Court following the Petitioner's conviction. The Court held that the Petitioner's argument that the death penalty cannot be constitutionally applied to an accused found guilty under the felony murder rule was immaterial since the evidence in this case could have supported the prosecutor's alternative theory that the Petitioner was guilty of premeditated murder. (Appendix A, page 11).

REASONS FOR GRANTING THE WRIT

I.

A GENERAL VERDICT OF GUILT IN A CAPITAL CASE BASED EITHER UPON A FINDING OF PREMEDITATED MURDER OR THE ALTERNATIVE THEORY THAT THE ACCUSED WAS CRIMINALLY LIABLE FOR THE ACTS OF AN ACCOMPLICE UNDER THE FELONY MURDER RULE IS CONSTITUTIONALLY INSUFFICIENT TO SUPPORT THE IMPOSITION OF THE DEATH PENALTY.

Petitioner contends that the Florida Supreme Court misapplied the recent decision of this Court in Enmund v. Florida, ____ U.S. ____, 73 L.Ed.2d 1140 (1982). Although it is possible that the Petitioner was convicted on the basis of premediated murder, it is also possible that he was convicted upon the alternative felony murder rule theory submitted to the jury. The latter basis for the imposition for criminal liability cannot constitutionally support the imposition of the death penalty and since it cannot be determined which of the theories of guilt the jury accepted, Petitioner's sentence of death cannot be upheld.

This Court held in Gregg v. Georgia, 428 U.S. 153 (1976) that the death penalty is an acceptable form of punishment for one convicted of premeditated murder. The Court reasoned that the penalty of death is not disproportionate when imposed "for the crime of murder, and when a life has been taken deliberately by the offender...", 428 U.S. at 187. Emphasis supplied. The question of whether the death penalty could be applied to a defendant convicted on the basis of the felony murder rule consistently with the Eighth and Fourteenth Amendments was presented to the Court in Lockett v. Ohio, 438 U.S. 568 (1978) but the Court decided that case upon another ground reserving the question for future consideration.

The Petitioner's Motion to Dismiss the indictment in this case was based upon the reasoning set forth in the concurring

opinions of Mr. Justice White and Mr. Justice Blackmun in the Lockett case (TR-43-46). Mr. Justice White specifically addressed the issue reasoning that:

> The infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable, or indeed any, perceptible goals of punishment... 438 U.S. at 626.

Similarly, Mr. Justice Blackmun stated that the application of the death penalty to one who aids or abets another felony in the course of which a victim is killed by someone else, is "particularly harsh" and "might skirt the limits of the Eighth Amendment proscription...against gross disproportionality..." 438 U.S. at 613, 614.

During the pendancy of the appeal in the instant case in the Florida Supreme Court, this Court decided in Enmund v. Florida, _____ U.S. _____, 73 L.Ed.2d 1140 (1982) that the imposition of the death penalty on a person who aids and abets a felony in the course of which murder is committed by others but who does not himself kill, attempt to kill, or intend to kill, constitutes a violation of the Eighth and Fourteenth Amendments. The Florida Court acknowledged the Enmund decision but held that the rule of law was not applicable since the instant case was submitted to the jury on the alternative theories of premediated murder and felony murder and since there was "sufficient evidence from which the jury could have found appellant guilty of premediated murder." (Appendix A. p. 11).

Petitioner submits that the reasoning of the Florida Supreme Court is contrary to the Eighth and Fourteenth Amendments of the United States Constitution as interpreted by this Court in Enmund. Surely a sentence of death should not be upheld upon the mere "possibility" that it was based upon a constitutionally acceptable ground. Indeed, the possibility that the conviction

was based upon a ground which cannot constitutionally support the imposition of death is all that is necessary to arrive at the conclusion that the sentence must be vacated.

This Court held in Sandstrom v. Montana, 442 U.S. 510 (1979) that if a case is submitted to a jury on alternative theories, the unconstitutionality of any of the theories requires that the conviction be set aside. Here, no less than in Sandstrom it is entirely possible that the jury convicted Petitioner on the constitutionally objectionable felony murder rule theory.[3] The prosecutor argued the felony murder theory during his closing argument (TR-2629, 2634, 2640, 2646) and the trial judge instructed the jury on the law of felony murder (TR-2676-2679).

As a plurality of the court recently noted in Connecticut v. Johnson,_____ U.S. _____ 32 Cr.L.Rptr. 3053 (No. 81-927 February 23, 1983) "the pivitol concept of Sandstrom is that the possibility that the jury reached its decision in an impermissible manner requires reversal even though the jury may also have reached the same result in a constitutionally acceptable fashion." Johnson at 32 Cr.L.Rptr. 3056 N.13 (emphasis in original). Here, as in Sandstrom there is "no reason to believe the jury would have deliberately undertaken the more difficult task" of finding premeditation or intent when it would have been "easier" to simply assess guilt on the basis of the felony murder rule. 442 U.S. at 526 N.13.

The fact that the Petitioner may have been convicted in the absence of any deliberate intent to take the life of another is documented in the text of the Florida Supreme Court opinion itself. In connection with Petitioner's argument before that Court that he was entitled to a jury instruction on the defense of withdrawal the Court noted that:

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[3]Petitioner refers to the constitutional defect in the felony murder rule theory only as it applies to the death penalty and not the conviction itself.

> "there are two theories upon which the jury might have found Appellant guilty of first degree murder based upon all of the evidence including Hall's testimony. Since there was no direct evidence establishing whether it was Copeland or Appellant who actually wielded the murder weapon, the jury could have simply concluded that one of them fired the fatal shots and that the other aided and abetted the murder...
>
> ...the other theory upon which the jury could have found Appellant guilty of first degree murder is the felony murder doctrine. Under this theory Appellant, as a joint participant in the crime of kidnapping, may be held liable for the acts of his co-felon and is therefore equally guilty, with the actual killer, of the murder which was a natural outgrowth and consequence of the kidnapping... (Appendix at p. 8).

Thus, the Court rejected the Petitioner's argument concerning the jury instruction on the defense of withdrawal upon the ground that the jury could have found absolute liability upon the basis of the felony murder rule. The Court then rejected the Petitioner's argument as to the validity of the death penalty made under the concurring opinions in Lockett v. Ohio, supra, and subsequently supported by this Court's decision in Enmund v. Fl da, supra, noting the possibility that the jury convicted the Petitioner upon the theory of premediated murder. The Court said that the rule in Enmund was inapplicable because:

> It is unnecessary, however, for us to try to apply that holding [Enmund v. Florida] in this case, since there was sufficient evidence from which the jury could of found Appellant guilty of premediated murder.

Thus the Court has recognized the possibility that the conviction was based upon the felony murder doctrine for one purpose and ignored that possibility for another. Although the possibility that the jury may have found Petitioner guilty on the

basis of the felony murder rule is all that is necessary for this argument, the record provides a clear indication that the jurors actually did base their verdict on the felony murder rule and not upon a finding that the Petitioner personally killed the victim. After brief deliberation the jury returned to ask the following questions:

Jury Foreman:	Your Honor, we have a question as to the first charge here as the way it is worded.
The Court:	Allright sir.
Jury Foreman:	The Defendant, Frank Smith, in Count I of the indictment is charged with the crime of murder in the first degree in that on the 12th or 13th day of December in the year of our Lord 1978 did unlawfully and from premediated design to effect the death of one Sheila Porter, kill and murder the said Sheila Porter by shooting her with a pistol. Our question is that it doesn't state here was he involved or did he actually do this or was a part of it or --
The Court:	No sir. I think that is included in the charge. And if -- you would read the, instruction, I think, covers it sir.
Jury Foreman:	You mean in the further charges, the other counts?
The Court:	No sir, in my charges to you on the law that is applicable to that.
Jury Foreman:	Well--
The Court:	If I--If I understand you, sir. Maybe I don't understand you.
Jury Foreman:	Well the question was were we to determine whether this man actually pulled the trigger or not? We never had any I don't believe, evidence one way or the other which -- who actually pulled the trigger. Was he suppose to be the accomplice in the fact or were or are we to determine whether he is guilty as being part of the -- (Emphasis supplied). (TR-2711-2713).

The trial judge ultimately asked the jurors to re-read the written jury instructions (TR-2713-2714) but it is clear from the question that the jury did not believe that the State proved that the Petitioner was the actual killer.

Thus the Florida Supreme Court has affirmed the imposition of the death penalty upon a person who could have been (and

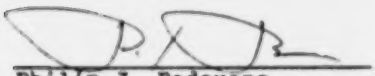
likely was) convicted of first degree murder in the absence of any deliberate intent to take the life of another. The Florida Supreme Court was of the opinion that the death sentence was constitutionally valid because "the jury could have found appellant guilty of premediated murder" but that argument is precisely the one which was rejected by this Court in Sandstrom v. Montana, supra.

The validity of the uncomplicated argument presented to this Court can be verified by the following syllogism (1) The death penalty is unconstitutional as applied to a defendant who is convicted on the basis of the felony murder rule in the absence of any intent to kill the victim, (2) it is impossible to determine from the record in this case whether the Petitioner was found guilty upon the vicarious liability imposed by the felony murder rule, and (3) the unconstitutionality of any alternative theory renders the result unconsitutional. Thus, the Petitioner's sentence of death cannot be upheld and the Florida Supreme Court was in error in affirming it.

CONCLUSION

For each of the foregoing reasons the Petitioner, Frank Smith, respectfully submits that the Court should grant the Petition for Writ of Certiorari and enter an Order vacating the Florida Supreme Court judgment below approving the imposition of the death penalty.

Respectfully submitted,



Philip J. Padovano
Post Office Box 873
Tallahassee, Florida 32302
904/224-3636

Supreme Court of Florida

No. 57,743

FRANK SMITH, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[October 28, 1982]

PER CURIAM.

This cause is before the Court on appeal from a capital felony conviction for which a sentence of death was imposed. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Frank Smith was convicted of robbery, kidnapping, sexual battery, and first-degree murder. The evidence showed that late in the evening on December 11, 1978, appellant and two accomplices went to a convenience store in Wakulla County and robbed store clerk Sheila Porter of money belonging to her employer. Then they abducted Sheila Porter from the store and took her into neighboring Leon County. There they took her to a motel room where all three men committed sexual battery upon her. Afterwards they took her to a wooded area. Accomplice Victor Hall testified at trial that he waited in the car while appellant and Johnny Copeland walked Sheila Porter into the woods. Then he heard three gunshots, after which appellant and Copeland returned to the car without Sheila. Her body was found two days later with three bullet wounds in the back of her head.

APPENDIX A

Appellant was initially indicted in Wakulla County for first-degree felony murder, robbery, kidnapping, and sexual battery. After his motion for change of venue was granted, trial commenced in Jefferson County but ended in a mistrial. Thereafter the prosecution was again taken up in Franklin County, where a second grand jury issued an indictment charging appellant with premeditated murder, robbery, kidnapping, and sexual battery. After trial the jury found appellant guilty of first-degree murder, robbery, kidnapping, and sexual battery. In accordance with the jury's recommendation, the trial judge imposed a sentence of death.

Appellant raises several questions regarding the validity of his conviction. He argues that the filing of the second indictment was improper; that the court erred in admitting into evidence some of his pretrial statements; that the court erred in admitting evidence of collateral crimes; and that the court erred in denying his requested instruction on the defense of withdrawal. Appellant also challenges as improper the imposition of the sentence of death. We find no reversible error and affirm the convictions and the sentence of death.

Appellant argues that the indictment was defective and should have been dismissed, on two grounds. He argues that the grand jury had no authority to make a substantive change in the pending indictment and he argues that the new indictment was filed so immediately prior to the commencement of the trial as to prejudice him in the preparation of his defense. Initially, the new indictment was captioned "Amended Indictment." Appellant moved to dismiss on the ground that a grand jury may not amend an indictment. Thereafter, the state moved to have the word "amended" stricken from the caption, asserting that it was a clerical error. The trial court denied appellant's motion and granted the state's. The court determined that the second grand jury had independently examined the evidence and had filed a new, rather than an amended, indictment. At the beginning of the trial the state filed a notice of nolle prosequi with regard to

the first indictment. Appellant is correct in his argument that a grand jury has no authority to amend an indictment to charge an additional or different offense. See Fla. R. Crim. P. 3.140(j) and Committee Note (1968); State v. Black, 385 So.2d 1272, 1273-77 (Fla. 1980)(England, J., concurring). However, a grand jury may file a completely new indictment regarding the same alleged criminal actions, even though a prior indictment is pending. See Committee Note, Fla. R. Crim. P. 3.140(j)(1968); Eldridge v. State, 27 Fla. 162, 9 So. 448 (1891).

So, a grand jury may charge a defendant with an additional or different offense by filing a second indictment. Although it may appear that the result is the same, the process is significantly different. Before filing the second indictment, the grand jury must independently evaluate the case. This requirement ensures that the grand jury itself finds the filing of additional or different charges appropriate. Since there is nothing in the record which refutes the trial court's finding that the second grand jury independently reviewed the evidence before returning the second indictment, there is no basis for us to disturb the court's ruling.

Appellant argues that the second indictment was untimely and prejudicial. We note that it was filed twenty days before the trial. Thus appellant had twenty days to prepare his defense against the additional charge of premeditated murder. This amount of preparation time was not insufficient considering the fact that the question of premeditation was already at issue in connection with the issues of intent to withdraw and intent to murder to avoid apprehension and prosecution.

Appellant's next two points on appeal concern the admissibility of pretrial statements he made to law enforcement officers before and after his arrest. Appellant argues that the statements were inadmissible because they were made after he was illegally detained, because he was denied his right to consult with counsel, and because the statements were not freely and voluntarily made.

Appellant invokes certain constitutional rules of evidence. Statements that are the product of illegal detention are inadmissible. Dunaway v. New York, 442 U.S. 200 (1979). A suspect has the right to consult with legal counsel before being questioned. Escobedo v. Illinois, 378 U.S. 478 (1964). Pretrial incriminating statements are only admissible if they are freely and voluntarily made. The facts as shown by the record, however, do not support any of appellant's contentions regarding the admissibility of his statements.

In the afternoon of December 13th, after Sheila Porter had been reported missing, police stopped appellant in Tallahassee and questioned him. Investigators had been told by a citizen that appellant owned a car matching the description of a car mentioned on the television news. Appellant allowed officers to photograph his car and told them he had been at his grandmother's house in Tallahassee the previous night.

The officers learned from another officer that the car in their photograph had been seen parked outside a Tallahassee motel the night before. Because of this discrepancy with appellant's story, an officer went to see appellant again that evening. The officer asked appellant to accompany him to the police station for questioning, but advised him he was not obliged to go. Appellant agreed to go. At the police station appellant told investigators he had spent the night alone at the motel after being stood up by a girlfriend. He denied having been in Wakulla County the night before. After the interview appellant declined a ride home and waited several hours for his friend Johnny Copeland who was also there being questioned. He finally was taken home by police officers at about 5:00 a.m., December 14.

Later that day, after gaining information indicating that appellant's car had been seen parked at the convenience store near the time of Sheila Porter's disappearance, police sought a warrant for appellant's arrest. He was arrested at 7:00 p.m., December 14, and again agreed to talk to investigators. He told them that he went with Johnny Copeland to the convenience store,

but that he was asleep in the back seat of the car. He said that when he awoke there was a white girl huddled down in the front seat, and he told Copeland to get her out of his car. So, Copeland took the girl and put her in his own car. Appellant said that the next time he saw Copeland, Copeland said that he had done something to the girl and described the area where he left her. Appellant then showed police to the general area where the body was subsequently discovered.

On the morning of December 18, after helping police search for the body, appellant talked to an attorney, but did not reach a formal agreement for representation. At his first appearance later that day, appellant told the judge that he did not have an attorney but was planning to get one. Three days later appellant told his jailer that he wanted to make a statement. Police advised him of his rights and he signed a waiver form. He confessed to participating in the robbery and kidnapping. He said he was present when Johnny Copeland and Victor Hall raped Sheila Porter, but he denied participating in the rape. He said he was present when Copeland shot Sheila, and said he tried to talk him out of doing so. This account was inconsistent with the trial testimony of Victor Hall, who said that Smith did participate in the sexual battery. Hall also testified that when appellant and Copeland took the victim into the woods and three shots were fired, it was appellant who was holding the gun when they came back.

The state introduced all of these statements into evidence. Before each questioning session, appellant was advised of his rights in accordance with the Miranda form. Appellant argues however that his pre-arrest statements were inadmissible because his detention was illegal. The detention was illegal, appellant contends, because the police did not have probable cause for an arrest. The argument is without merit. Before his arrest pursuant to warrant, appellant was not detained and was not required to answer questions. He voluntarily agreed to be interviewed.

Appellant argues that his post-arrest statements were inadmissible because they were made without benefit of legal counsel. This argument also is without merit. The record shows that the statements were freely and voluntarily made after appellant had been advised of his constitutional rights. At no time did appellant ask to see a lawyer or state that he was represented by a lawyer. The evidence as a whole shows that appellant, in making the statements, was not coerced in any manner.

Appellant also argues that his inconsistent exculpatory pre-trial statements were improperly admitted to impeach other pre-trial statements. He contends that since he was not a witness his credibility was not in issue and such impeachment evidence was therefore irrelevant. We disagree. The credibility of appellant's ultimate confession was, of course, a material issue for the jury to decide. His earlier exculpatory statements, and the sequence of events showing how his story changed through the course of several interviews, were certainly relevant to this issue. Furthermore, the earlier statements and the context in which they were given were also relevant to show that appellant had attempted to avoid detection by lying to the police. See Cortes v. State, 135 Fla. 589, 185 So. 323 (1938); 1 Wharton's Criminal Evidence, § 215 (13th ed. 1972). As such they were an indication of guilt, the ultimate material issue.

Since the statements were thus relevant, they were to be deemed admissible unless excluded by some specific rule of law. § 90.402, Fla. Stat. (1979). Contrary to the claim of appellant, the statements were not inadmissible as hearsay, because they were made by the defendant and were therefore excepted from the hearsay rule. Id. § 90.803(18)(a). Furthermore, the earlier exculpatory statements were offered not to prove the truth of the matters stated, but rather to show the context of appellant's confession, so they were not even hearsay at all. Id. § 90.801(1)(c).

Appellant contends that the court erred in admitting evidence of collateral crimes. Over appellant's objection, Victor Hall was allowed to testify that on the day of the robbery appellant stole some gasoline and a .22 caliber rifle. Appellant argues that the evidence was not relevant to show anything other than propensity to commit crime since there was no evidence of a relation between these matters and the crimes charged. The evidence showed that the crimes were committed with a .22 caliber pistol, not a rifle.

The evidence of the theft of the gasoline was relevant and therefore admissible, but the evidence of the theft of the rifle was irrelevant and therefore inadmissible. The theft of the gasoline was part of the res gestae of the criminal episode. See Smith v. State, 365 So.2d 704 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Ashley v. State, 265 So.2d 685 (Fla. 1972). The evidence was connected in that it showed how appellant and his accomplices were able to get around to commit the crimes and it showed motivation in that it suggested their need for money.

The theft of the rifle is not so connected with the crimes charged. That it occurred the same night is not enough to bring it within the res gestae. Although the evidence was irrelevant, appellant has failed to show how he was prejudiced. The testimony concerning the theft of the rifle was insignificant compared with the whole of the evidence of appellant's guilt of the crime charged. Since appellant has failed to show how the jury's decision could have been influenced by this one irrelevant statement, we find the error to be harmless. See State v. Wadsworth, 210 So.2d 4 (Fla. 1968).

Finally, appellant argues that his conviction should be reversed and a new trial granted because the court refused his requested jury instruction on the defense of withdrawal. He asserts that the evidence to support this defense was found in his confession in which he admitted participating in the robbery and kidnapping but maintained that he tried to talk Copeland out of killing the victim.

This contention is without merit. Victor Hall testified that after the multiple rape, he, Copeland, and appellant took Sheila Porter by automobile to a wooded area and that Copeland and appellant took the girl into the woods. Then, Hall said, he heard three gunshots, following which Copeland and appellant returned to the car. Hall said that at this point appellant was holding the pistol.

There are two theories upon which the jury might have found appellant guilty of first-degree murder based upon all the evidence, including Hall's testimony. Since there was no direct evidence establishing whether it was Copeland or appellant who actually wielded the murder weapon, the jury could have simply concluded that one of them fired the fatal shots and that the other aided and abetted the murder. § 777.011, Fla. Stat. (1977). Under this theory, assuming that only one person did the actual killing, the other could be found guilty of premeditated murder if the evidence was sufficient to show that he aided, abetted, counseled, hired, or otherwise procured the commission of the offense of premeditated murder, and it is not necessary that the jury actually determine which man did the killing and which one aided and abetted. E.g., Sons v. State, 99 So.2d 888 (Fla. 2d DCA), cert. denied, 357 U.S. 910 (1958).

The other theory upon which the jury could have found appellant guilty of first-degree murder is the felony murder doctrine. Under this theory appellant, as a joint participant in the crime of kidnapping, may be held liable for the acts of his co-felon and is therefore equally guilty, with the actual killer, of the murder which was a natural outgrowth and consequence of the kidnapping. Under this theory the jury would not have needed to conclude that appellant had the requisite intent to be an aider and abettor.

Under either of these theories of liability, the defense of withdrawal may be established if the defendant is able to make the requisite showing. To establish the common-law defense of withdrawal from the crime of premeditated murder, a defendant

must show that he abandoned and renounced his intention to kill the victim and that he clearly communicated his renunciation to his accomplices in sufficient time for them to consider abandoning the criminal plan. 1 C. Torcia, Wharton's Criminal Law § 37 (14th ed. 1978); 40 C. J. S. Homicide § 9. For a defendant whose liability is predicated upon the felony murder theory, the required showing is the same and the defense is available even after the underlying felony or felonies have been completed. Again the defendant would have to show renunciation of the impending murder and communication of his renunciation to his co-felons in sufficient time to allow them to consider refraining from the homicide.

Appellant contends that he was entitled to an instruction on withdrawal because his last pretrial statement, which was entered into evidence by way of police testimony, said that Copeland was the killer and that appellant tried to talk Copeland out of killing the girl. The testimony of Hall was that Copeland and Smith both agreed to the killing. Hall's testimony made no mention of any communication of withdrawal by appellant during the automobile trip from the motel to the murder scene. Defense counsel surely could have attempted to bring out such facts on cross-examination if Hall had heard any such renunciation.

As was pointed out above, the evidence upon which appellant relies in arguing that he was entitled to the instruction is his final pretrial statement. It is worthy of note that appellant moved to suppress his pretrial statements and that the denial of his motion to suppress is made the subject of one of his points on this appeal.

Appellant correctly points out that a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions. Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945); Laythe v. State, 330 So.2d 113 (Fla. 3d DCA), cert. denied, 339 So.2d 1172 (Fla. 1976); Stiglitz v. State, 270 So.2d 410 (Fla. 4th DCA 1972); Canada v. State, 139 So.2d 753

(Fla. 2d DCA 1962). If there is any evidence of withdrawal, an instruction should be given. The trial judge should not weigh the evidence for the purpose of determining whether the instruction is appropriate. Appellant's pretrial statement, however, testified to by a state witness, seems hardly sufficient to raise the issue of withdrawal in view of the above-discussed facts. Without formulating any general harmless error rule regarding improper denial of instructions on defenses, we hold that here the error, if any, was harmless. No new trial is required.

We come now to consideration of the imposition of a sentence of death upon appellant. After the hearing of the sentencing-phase evidence and argument, the jury recommended death. The court found six statutory aggravating circumstances and one statutory mitigating circumstance. The court found that appellant had twice previously been convicted of felonies involving the use or threat of violence; that the capital felony was committed in the course of a kidnapping and in the course of flight after the commission of rape; that the capital felony was committed to prevent detection and arrest; that the capital felony was committed for pecuniary gain; that the capital felony was especially heinous, atrocious, or cruel; and that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The court found that appellant's youthful age of nineteen at the time of the crime was a mitigating circumstance.

Appellant argues that the death penalty may not be imposed where the capital felony conviction is based on the vicarious liability of felony murder. This argument is based on the concept of proportionality under the cruel and unusual punishment clause of the Eighth Amendment. Appellant relies on Lockett v. Ohio, 438 U.S. 586 (1978), where Justice White, concurring, said "that it violates the Eighth Amendment to impose the penalty of death without a finding that the defendant possessed a purpose to cause the death of the victim." 438 U.S. at 624. Since then the

United States Supreme Court has held in a felony murder case that a sentence of death may not be imposed in the absence of proof that the defendant killed, attempted to kill, intended to kill, contemplated that life would be taken, or anticipated that lethal force would or might be used. Enmund v. Florida, 102 S.Ct. 3368, 3372, 3379 (1982). It is unnecessary, however, for us to try to apply that holding in this case, since here there was sufficient evidence from which the jury could have found appellant guilty of premeditated murder.

Appellant argues that the court's finding that the capital felony was committed for the purpose of avoiding arrest is not supported by evidence. This argument has no merit since Victor Hall testified that on two separate occasions appellant and Johnny Copeland talked about killing Sheila Porter so that she would not be able to testify against them.

Appellant argues that the court erred by giving improper double consideration to a single feature of the crime in finding the murder was committed in the course of a statutorily enumerated felony and for pecuniary gain. This argument overlooks the fact that the former aggravating circumstance was based on kidnapping and sexual battery, leaving the factor of robbery to support the finding of the latter circumstance without any overlap.

Appellant argues that the finding of heinousness was improper. This argument is refuted by the proven facts of the abduction, confinement, sexual abuse, and ultimate execution-style killing of the victim. See Knight v. State, 338 So.2d 201 (Fla. 1976).

Finally, appellant challenges the court's application of the factor that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. § 921.141(5)(i), Fla. Stat. (1979). This statutory aggravating circumstance was added to the capital felony sentencing statute by the 1979 legislature. Ch. 79-353, Laws of Fla. Thus it was enacted after the commission of the

offense in this case. Appellant argues that this new provision is unconstitutionally vague and invalid in that it does not require the proof of any additional fact not already required to establish the offense itself.

We reject the contention that paragraph (5)(i) is void for vagueness. This new aggravating circumstance was enacted to limit the use of premeditation as an aggravating circumstance in cases of first-degree murder. Premeditation is only to be relied upon as an aggravating factor when the capital felony was committed in a cold and calculated manner without any pretense of moral or legal justification. See Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 102 S.Ct. 2256 (1982). Paragraph (5)(i) may be applied to murders committed before its effective date. Id. We conclude that there was an ample basis for the judge to follow the jury's recommendation of a sentence of death.

The appellant's convictions for robbery with a firearm, kidnapping, sexual battery, and murder in the first degree are affirmed. The sentence of death is also affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON and McDONALD, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Wakulla County,

Kenneth E. Cooksey, Judge - Case No. 78-CF-66

Philip J. Padovano, Tallahassee, Florida,

for Appellant

Jim Smith, Attorney General and David P. Gauldin, Assistant Attorney General, Tallahassee, Florida,

for Appellee

IN THE SUPREME COURT OF FLORIDA

THURSDAY, JANUARY 27, 1983

FRANK SMITH,	**	
Appellant,	**	CASE NO. 57,743
vs.	**	
STATE OF FLORIDA,	**	Circuit Court Case No. 78-CF-66 (Wakulla)
Appellee.	**	

On consideration of the petition for rehearing filed by attorney for appellant,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ALDERMAN, C.J., ADKINS, BOYD and OVERTON, JJ., Concur
McDONALD, J., Dissents

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

Debbie Causseaux
Clerk

cc: Hon. Carlton Tucker, Clerk
Hon. Kenneth E. Cooksey, Judge

Philip J. Padovano, Esquire
David P. Gauldin, Esquire

APPENDIX B

CHAPTER 782

HOMICIDE

782.02 Justifiable use of deadly force.—The use of deadly force is justifiable when a person is resisting any attempt to murder such person or to commit any felony upon him or upon or in any dwelling house in which such person shall be.

History.—ss. 4, 5, ch. 1637, 1868; RS 2378, ch. 4987, 1901; s. 1, ch. 4964, 1901; GS 3203; RGS 5033; CGL 7135; s. 66, ch. 74-383; s. 1, ch. 75-24; s. 43, ch. 75-298.

782.03 Excusable homicide.—Homicide is excusable when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution, and without any unlawful intent, or by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, without any dangerous weapon being used and not done in a cruel or unusual manner.

History.—s. 6, ch. 1637, 1868; RS 2379; GS 3204; RGS 5034; CGL 7136; s. 1, ch. 75-13.

782.04 Murder.—

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium by a person 18 years of age or older, when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in s. 775.082.

(b) In all cases under this section, the procedure set forth in s. 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 2, ch. 1637, 1868; RS 2380; GS 3205; RGS 5035; s. 1, ch. 8470, 1921; CGL 7137; s. 1, ch. 28023, 1953; s. 712, ch. 71-136; s. 3, ch. 72-724; s. 14, ch. 74-383; s. 6, ch. 75-298; s. 1, ch. 78-141; s. 290, ch. 79-400.

782.07 Manslaughter.—The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—RS 2384; GS 3209; RGS 5039; CGL 7141; s. 715, ch. 71-136; s. 180, ch. 73-333; s. 15, ch. 74-383; s. 6, ch. 75-298.
cf.—s. 860.01 Death caused by operation of motor vehicle while intoxicated.

782.071 Vehicular homicide.—"Vehicular homicide" is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another. Vehicular homicide is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 16, ch. 74-383; s. 6, ch. 75-298.
cf.—s. 860.01 Death caused by operation of motor vehicle while intoxicated.

782.08 Assisting self-murder.—Every person deliberately assisting another in the commission of self-murder shall be guilty of manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 9, ch. 1637, 1868; RS 2383; GS 3210; RGS 5040; CGL 7142; s. 716, ch. 71-136.

782.09 Killing of unborn child by injury to mother.—The willful killing of an unborn quick child, by any injury to the mother of such child which would be murder if it resulted in the death of such mother, shall be deemed manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

History.—s. 10, ch. 1637, 1868; RS 2388; GS 3211; RGS 5041; CGL 7143; s. 717, ch. 71-136.

782.11 Unnecessary killing to prevent un-

CHAPTER 921

SENTENCE

921.09 Fees of physicians who determine sanity at time of sentence.—The court shall allow reasonable fees to physicians appointed by the court to determine the mental condition of a defendant who has alleged insanity as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 235, ch. 19554, 1939; CGL 1940 Supp. 8083(264); s. 121, ch. 70-339.

921.12 Fees of physicians when pregnancy is alleged as cause for not pronouncing sentence.—The court shall allow reasonable fees to the physicians appointed to examine a defendant who has alleged her pregnancy as a cause for not pronouncing sentence. The fees shall be paid by the county in which the indictment was found or the information or affidavit filed.

History.—s. 258, ch. 19554, 1939; CGL 1940 Supp. 8083(267); s. 122, ch. 70-339.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 217a, ch. 19554, 1939; CGL 1940 Supp. [illegible]

Note.—Former s. 919.23.

921.143 Appearance of victim to make statement at sentencing hearing; submission of written statement.—

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which shall be filed with the sentencing court.

(2) The state attorney or any assistant state attorney shall advise all victims that statements, whether oral or written, shall relate solely to the facts of the case and the extent of any injuries, financial losses, and loss of earnings directly resulting from the crime for which the defendant is being sentenced.

(3) The court may refuse to accept a negotiated plea and order the defendant to stand trial.

History.—ss. 9, 10, ch. 78-274.

921.15 Stay of execution of sentence to fine; bond and proceedings.—

(1) When a defendant is sentenced to pay a fine, he shall have the right to give bail for payment of the fine and the costs of prosecution. The bond shall be executed by the defendant and two sureties approved by the sheriff or the officer charged with execution of the judgment.

(2) The bond shall be made payable in 90 days to the Governor and his successors in office.

(3) If the bond is not paid at the expiration of 90 days, the sheriff or the officer charged with execution of the judgment shall indorse the default on the bond and file it with the clerk of the court in which the judgment was rendered. The clerk shall issue an execution as if there had been a judgment at law on the bond, and the same proceedings shall be followed as in other executions. After default of the bond, the convicted person may be proceeded against as if bond had not been given.

History.—s. 280a, ch. 19554, 1939; CGL 8426, 8427; CGL 1940 Supp. 8663(279); s. 125, ch. 70-339.

921.16 When sentences to be concurrent and when consecutive.—

(1) A defendant convicted of two or more offenses charged in the same indictment, information, or affidavit or in consolidated indictments, informations, or affidavits shall serve the sentences of imprisonment concurrently unless the court directs that two or more of the sentences be served consecutively. Sentences of imprisonment for offenses not charged in the same indictment, information, or affidavit shall